Calendar No. 842

101ST CONGRESS
2d Session

SENATE

REPORT
101-473

PROVIDING FOR THE PROTECTION OF NATIVE AMERICAN GRAVES AND THE REPATRIATION OF NATIVE AMERICAN REMAINS AND CULTURAL PATRIMONY

SEPTEMBER 26 (legislative day, SEPTEMBER 10), 1990.—Ordered to be printed

---

Mr. INOUYE, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 1980]

[Including cost estimate of the Congressional Budget Office]

The Select Committee on Indian Affairs, to which was referred the bill (S. 1980) to provide for the protection of Native American graves and the repatriation of Native American remains and cultural patrimony, having awarded the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

PURPOSE

The purpose of S. 1980 is to provide for the protection of Native American graves and the repatriation of Native American remains and cultural patrimony.

BACKGROUND

Legislation to establish a process for the repatriation of Native American human remains, funerary objects, cultural patrimony and sacred objects had its origins in a hearing that was held by the Select Committee on Indian Affairs in February of 1987. In his testimony on a bill to provide for the repatriation of Indian artifacts, Smithsonian Secretary Robert McCormick Adams indicated that of the 34,000 human remains currently in the Institution's collection,

S413-12

approximately 42.5% or 14,523 of the specimens are the remains of North American Indians, and another 11.9% or 4,061 of the specimens represent Eskimo, Aleut, and Koniag populations. Tribal reaction to Secretary Adams' testimony was swift, and in the months which followed, Indian tribes around the country called for the repatriation of those human remains that could be identified as associated with a specific tribe or region for their permanent disposition in accordance with tribal customs and traditions, and for the proper burial elsewhere of those remains of Native Americans that could not be so identified.

In 1988, the Select Committee on Indian Affairs held hearings on S. 187, a bill to provide a process for the repatriation of Native American cultural patrimony. In these hearings, the Committee received testimony from witnesses representing museums and various Indian tribes. Several witnesses, including representatives of the American Association of Museums (AAM), requested that the Committee delay any further action on this bill or any other repatriation measure, in order to allow the museum community an opportunity to enter into a dialogue with the Indian community on repatriation issues. The witness representing AAM stated that the Association might be able to develop a mutually-acceptable resolution to the issue of repatriation that would dispense with the need for legislation by meeting with tribal representatives. During 1989, the Heard Museum in Phoenix, Arizona sponsored a year long dialogue between museum professionals (including archaeologists and anthropologists) and Native Americans. The purpose of the dialogue was to develop recommendations to address the necessity of responding to tribal demands for repatriation. Findings and recommendations that were agreed to by the participants in the dialogue were published in the Report of the Panel for a National Dialogue on Museum/Native American Relations, which was issued on February 28, 1990.

The Report of the Panel for a National Dialogue on Museum/Native American Relations contained findings and recommendations, general principles governing the relations between museums and Indian tribes, and established policy guidelines outlining museum responsibilities as well as repatriation policies and procedures. The Panel found that the process for determining the appropriate disposition and treatment of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony should be governed by respect for Native human rights. The Panel report states that human remains must at all times be accorded dignity and respect. The Panel report indicated the need for Federal legislation to implement the recommendations of the Panel.

The Panel also recommended the development of judicially-enforceable standards for repatriation of Native American human remains and objects. The report recommended that museums consult with Indian tribes to the fullest extent possible regarding the right of possession and treatment of remains and objects prior to acquiring sensitive materials. Additional recommendations of the Panel included requiring regular consultation and dialogue between Indian tribes and museums; providing Indian tribes with access to information regarding remains and objects in museum collections;

providing that Indian tribes should have the right to determine the appropriate disposition of remains and funerary objects and that reasonable accommodations should be made to allow valid and respectful scientific use of materials when it is compatible with tribal religious and cultural practices.

On May 11, 1989, Senator Inouye introduced S. 978, the National Museum of the American Indian Act. As part of this legislation to establish a museum for the American Indian within the Smithsonian Institution, the bill also included provisions related to the proper treatment and appropriate disposition of Native American human remains and sacred objects. In hearings of the Select Committee on Indian Affairs on S. 978, the Committee received testimony from several tribal witnesses indicating the significance of certain sacred objects to their respective tribes and the need to have those objects returned to the tribe so that important religious ceremonies in which such objects are central could be resumed. Tribal witnesses also testified that the vast numbers of Native American human remains contained in the Smithsonian collections which, according to tribal religious practices, must be given appropriate burials.

The testimony received by the Committee indicated a need for provisions in S. 978 to provide a process for the inventory, identification and subsequent repatriation of Native American human remains and funerary objects. The Committee worked with the Smithsonian Institution and tribal representatives to develop such a process. These provisions were made a part of S. 978, the National Museum of the American Indian Act. The President signed S. 978 into law on November 28, 1989 (Public Law 101-185). The provisions of Public Law 101-185 which authorize the repatriation of human remains and funerary objects from the collections of the Smithsonian Institution established a precedent for further legislative action.

On May 17, 1989, Senator McCain introduced S. 1021, the Native American Grave and Burial Protection Act, to provide for the protection of Indian graves and burial grounds. On November 21, 1989, Senator Inouye introduced S. 1980, the Native American Repatriation of Cultural Patrimony Act to provide for the repatriation of Native Americans group or cultural patrimony. The provisions of S. 1980 were modeled after the provisions contained in Public Law 101-185. S. 1980 would extend the inventory, identification and repatriation provisions of Public Law 101-185 to all Federal agencies and any institution which receives Federal funding. The provisions of the bill include protections of Native American sacred objects and items of Native American cultural patrimony.

On May 14, 1990, the Select Committee on Indian Affairs held a hearing on S. 1021, S. 1980, and the Report of the Panel for a National Dialogue on Museum/Native American Relations. The Committee received testimony from several professional associations of archaeologists and anthropologists, representatives of several museums with Native American collections, private art dealers and tribal leaders. Tribal witnesses testified at the hearing that their rights to Native American human remains, funerary objects, sacred objects and cultural patrimony have been ignored or discounted by the museum and scientific communities. The Commit-

tee also received testimony from tribal representatives which indicated that in cases where Native Americans have attempted to regain items that were inappropriately alienated from their tribes, they have met with resistance from museums and have lacked the legal ability of financial resources to pursue the return of the items. Several witnesses testified that in many instances Indian tribes do not know what types of remains or objects are in the possession of museums and have been unsuccessful in their attempts to obtain access to this information.

In addition, the Committee received testimony from representatives of museums that there are a few instances where a museum and an Indian tribe have agreed to the repatriation of human remains and sacred objects. There was also testimony about other agreements between Indian tribes and museums that allowed the museums to retain possession of sacred objects except during certain times of the year when those objects were required for tribal religious ceremonies. A witness also described an agreement between an Indian tribe and a museum whereby the human remains of tribal members were returned to the Indian tribe and reinterred and periodically, scientists would be allowed access to the remains to continue their studies of the remains. These examples presented by wintesses indicated the need for a process in which meaningful discussions between Indian tribes and museums regarding their respective interests in the disposition of human remains and objects in the museum's collections could be discussed and the resolution of competing interests could be facilitated.

Tribal leaders and representatives of the archaeological community testified to the great need for Federal legislation which could provide additional protections to Native American burial sites. Indian tribes have had many difficulties in preventing the illegal excavation of graves on tribal and Federal lands. Several witnesses testified that there is a flourishing trade in funerary and sacred objects that have been obtained from burials located on tribal and Federal lands. Additional testimony was received from witnesses which indicated that tribal and Federal officials have been unable to prevent the continued looting of Native American graves and the sale of these objects by unscrupulous collectors.

The Committee also received testimony from tribal witnesses who felt that the return of human remains to Indian tribes has been a most frustrating issue to Native Americans. In cases where remains are identifiable, tribal witnesses felt strongly that they should be returned for proper burial, which is an important part of the religious and traditional life cycle of Native Americans, including Native Hawaiians. Tribal witnesses also testified that in the case of unidentifiable Native American human remains, the human remains should still be given proper burial. The Committee received testimony from professionals in the scientific community who say that there is an overriding interest in the acquisition and retention of human remains for the purpose of scientific inquiry. Scientists have indicated that recent technological advances allow them to analyze bones and learn new facts and pursue important research on diet, disease, genetics and related matters. Native American witnesses have indicated that they do not object to the study of human remains when there is a specific purpose to the

study and a definitive time period for the study. The Native American witnesses did object, however, to museums retaining human remains without a clear purpose, especially when those human remains are identifiable and affiliated with a specific Indian tribe. In addition, at least one tribal witness questioned the scientific value of unidentifiable remains.

COMMITTEE AMENDMENT

The Committee adopted an amendment in the nature of a substitute to S. 1980, the Native American Grave Protection and Repatriation Act. The provisions of the substitute amendment would extend the provisions on inventory, identification, and repatriation of Public Law 101-185, the National Museum of the American Indian Act, to Federal agencies and museums receiving Federal funds. The Committee intends the provisions of this Act to establish a process which shall provide a framework for discussions between Indian tribes and museums and Federal agencies. The Committee believes that the process established under this Act will prevent many of the past instances of cultural insensitivity to Native American peoples. The Committee has received testimony describing instances where museums have treated Native American human remains and funerary objects in a manner entirely different from the treatment of other human remains. Several tribal leaders expressed their outrage at the manner in which Native American human remains had been treated, stored or displayed and the use of culturally sensitive materials and objects in violation of traditional Native American religious practices. In the long history of relations between Native Americans and museums, these culturally insensitive practices have occurred because of the failure of museums to seek the consent of or consult with Indian tribes.

FINDINGS

The substitute amendment finds that many Federal agencies, as well as state and private museums which receive Federal funding have large numbers of human remains of Native Americans in their collections. Some of the Native American human remains in these collections are culturally affiliated with present day Indian tribes. The Committee finds that many Indian tribes and Native Hawaiians have expressed a clear and unequivocal interest in the return of these remains to the Indian tribe or Native Hawaiian organization so that the tribe, family or organization may determine the appropriate disposition of the remains which is consistent with their religious and cultural practices. The Committee has received testimony from several museums and Indian tribes about agreements that have been reached on the disposition of Native American human remains and objects. One example of an agreement reached between an Indian tribe and a museum is in Nevada where the state museum agreed to return the human remains in their collections to the Fallon Paiute Tribe for appropriate burial on the reservation. The tribe in turn placed the human remains in a specially designed crypt which could be opened periodically to provide access for scientists to continue the study of the human remains. The Committee intends this legislation to allow for the de-

velopment of agreements between Indian tribes and museums which reflect an understanding of the important historic and cultural value of the remains and objects in museum collections.

The Committee agrees with the findings and recommendations of the Panel for a National Dialogue on Museum/Native American Relations. The Committee believes that this legislation will encourage a continuing dialogue between museums and Indian tribes and Native Hawaiian organizations and will promote greater understanding between the groups. The Committee believes that human remains must at all times be treated with dignity and respect. The Committee recognizes the important function museums serve in society by preserving the past to educate the public and increase awarness about our country's history.

DEFINITIONS

The substitute amendment contains several definitions which are intended to clearly delineate the scope and application of the bill. The Committee intends that these definitions will provide the necessary clarity to potentially ambiguous terms. The Committee shares the concerns expressed by several hearing witnesses that terms such as "sacred" or "cultural patrimony" could be construed to include a broad range of objects and items which would be outside the scope of this legislation.

There has been much debate with regard to the definitions contained in the Act. Members of the scientific community express concern that if Native Americans are allowed to define terms such as "sacred object", the definition may be so broad as to arguably include any Native American object. In an effort to respond to this concern, the Committee has carefully considered the issue of defining objects within the context of who may be in the best position to have full access to information regarding whether an object is sacred to a particular tribe or Native Hawaiian group. Many tribes have advanced the position that only those who practice a religion or whose tradition it is to engage in a religious practice can define what is sacred to that religion or religious practice. Some have observed that any definition of a sacred object necessarily lacks the precision that might otherwise characterize legislative definitions, given that the definition of sacred objects will vary according to the tribe or religious practice engaged in by the tribe, and pointing to the difficulty that would arise if one were charged with defining objects that are central to the practice of certain religions, such as defining the Bible or the Koran.

The Committee has made every effort to incorporate the comments and address the concerns of members of the scientific and museum communities with regard to the substantive definitions set forth in the Act, while at the same time recognizing that there are over 200 tribes and 200 Alaska Native villages and Native Hawaiian communities, each with distinct cultures and traditional and religious practices that are unique to each community. Accordingly, the definitions of sacred objects, funerary objects, and items of cultural patrimony will vary according to the tribe, village, or Native Hawaiian community.

The substitute amendment establishes four categories of objects subject to the provisions of the Act. These categories are Native American human remains, funerary objects, sacred objects and objects of cultural patrimony. These categories are specifically defined in the substitute amendment. The Committee intends the term "funerary object" to mean any object placed with a deceased Native American as part of a death rite ceremony. The substitute amendment also defines the term "burial site" broadly to include all traditional Native American burial sites such as rock cairns or pyres which do not fall within the ordinary definition of grave site. Throughout the bill, the Committee specifically uses the phrase "associated funerary object" by which the Committee intends that a funerary object must be associated with the remains of a Native American to fall within the protections afforded by the bill.

The substitute amendment includes a revised definition of the term "sacred object." The Committee received comments regarding the ambiguity surrounding the term "sacred," in particular when that term is used in reference to Native American religious practices. There has been concern expressed that any object could be imbued with sacredness in the eyes of a Native American, from an ancient pottery shard to an arrowhead. The Committee does not intend this result. The term sacred object is an object that was devoted to a traditional religious ceremony or ritual when possessed by a Native American and which has religious significance or function in the continued observance or renewal of such ceremony. The Committee intends that a sacred object must not only have been used in a Native American religious ceremony but that the object must also have religious significance. The Committee recognizes that an object such as an altar candle may have a secular function and still be employed in a religious ceremony. The substitute amendment requires that the primary purpose of the object is that the object must be used in a Native American religious ceremony in order to fall within the protections afforded by the bill. It has been suggested that some Native American artisans create objects which could be construed as falling within the definition of sacred object and therefore this provision would adversely impact the trade in Native American artwork. The Committee does not intend the definition of sacred object to include objects which were created for purely a secular purpose, including the sale or trade in Indian art.

The substitute amendment also includes a revised definition of the term "Native American cultural patrimony." The Committee received comments from several witnesses regarding the lack of clarity in the original definition of cultural patrimony. These concerns focused primarily on the character of property within traditional Native American societies where property was held by the whole community, not by an individual. It had been suggested that in traditional Native American societies no object could be conveyed by an individual because it was owned by the collective whole. The substitute amendment defines "Native American cultural patrimony" as an object with significant historical, traditional or cultural importance and which is central to the culture of an Indian tribe or to Native Hawaiians. The Committee intends this term to refer to only those items that have such great importance

to an Indian tribe or to the Native Hawaiian culture that they cannot be conveyed, appropriated or transferred by an individual member. Objects of Native American cultural patrimony would include items such as Zuni War Gods, the Wampum belts of the Iroquois, and other objects of a similar character and significance to the Indian tribe as a whole.

The substitute amendment also includes a definition of the term "right of possession." The term "right of possession" refers to the authority by which a museum or agency came into possession of human remains of a Native American, funerary object, sacred object, or object of cultural patrimony. The Committee intends this term to provide a legal framework in which to determine the circumstances by which a museum or agency came into possession of these remains or objects. The Committee has heard from many tribal leaders situations where important ceremonial objects have been stolen from the Indian tribe only to reappear later in the collections of a museum. The term "right of possession" will provide a clear standard for determining whether an object was originally acquired with the voluntary consent of an individual or an Indian tribe which had the authority to alienate the object. "Right of possession" also refers to the original acquisition of human remains of a Native American. In order to have the "right of possession" to human remains of a Native American a museum must have originally acquired the remains with the full knowledge and consent of the next of kin or the Indian tribe. The "right of possession" to an object requires that the party have obtained possession of the object with the voluntary consent of an individual who has the authority to alienate possession of the object.

The Committee shares the concerns expressed by tribal leaders that museums and agencies have not, until recently, inquired into the circumstances of how an individual came to possess a funerary object, sacred object or object of cultural patrimony. This practice has contributed to the continued growth of a black market in the sale and trade of objects illegally removed from Indian burial sites located on Federal and tribal lands. The Committee intends this definition to provide a standard by which the legal possession of an object may be viewed. Review of the right of possession to a given object is very similar to the transfer of title to other forms of property. The Committee intends this section to operate in a manner that is consistent with general property law i.e., an individual may only acquire the title to property that is held by the transferor.

The substitute amendment includes a revised definition of the term "cultural affiliation." The term "cultural affiliation" means a relationship between a present day Indian tribe and a historic or prehistoric Indian tribe or Native Hawaiian group. The Committee intends the relationship to be reasonably established through an offer of evidence which shows a continuity of group identity from the earlier to the present day group. The Committee intends that the "cultural affiliation" of an Indian tribe to Native American human remains or objects shall be established by a simple preponderance of the evidence. Claimants do not have to establish "cultural affiliation" with scientific certainty. This standard of proof applies to determinations of "cultural affiliation" as well as determinations of "right of possession" as established in the Act.

The types of evidence which may be offered to show cultural affiliation may include, but are not limited to, geographical, kinship, biological, archaeological, anthropological, linguistic, oral tradition, or historical evidence or other relevant information or expert opinion. The requirement of continuity between present day Indian tribes and materials from historic or prehistoric Indian tribes is intended to ensure that the claimant has a reasonable connection with the materials. Where human remains and funerary objects are concerned, the Committee is aware that it may be extremely difficult, unfair or even impossible in many instances for claimants to show an absolute continuity from present day Indian tribes to older, prehistoric remains without some reasonable gaps in the historic or prehistoric record. In such instances, a finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of gaps in the record.

New Excavations or Discoveries

The substitute amendment provides that for any Native American human remains or funerary objects, excavated or discovered on Federal or tribal land after enactment of this Act, the lineal descendants shall have the right of possession. It further provides that for sacred objects, objects of cultural patrimony and human remains or funerary objects where there are no lineal descendants, the right of possession shall be in the Indian tribe or Native Hawaiian family or organization on whose land the items were found or the Indian tribe or Native Hawaiian family or organization which has the closest cultural affiliation to those items. The substitute amendment also provides that for those human remains or objects discovered on Federal lands where the cultural affiliation cannot be reasonably ascertained, the right of possession shall be in the Indian tribe or Native Hawaiian organization that aboriginally occupied the area where the items were discovered. This section of the bill requires an Indian tribe or Native Hawaiian community or organization to state a claim for the right of possession to objects found outside their traditional or present day lands.

The Committee recognizes that in some areas of the country several Indian tribes may have to claim human remains or objects found on their aboriginal lands. The Committee also recognizes that there may be circumstances where human remains or objects found on one Indian tribe's lands may be culturally affiliated with a different Indian tribe. In these situations, where more than one Indian tribe makes a claim for the right of possession, the Committee intends that a determination of the right of possession shall be based on the best available evidence given the totality of the circumstances. Determinations of the right of possession should be made pursuant to the regulations promulgated by the Secretary in consultation with the Review Committee. The Committee contemplates that the Review Committee could serve as a useful mediator in resolving a dispute between Indian tribes regarding the ownership, control, or right of possession of human remains or objects. In addition, the Committee intends this section to allow for the negoti-

ation of agreements between Indian tribes that provide for mutually acceptable dispositions for human remains or objects over which there are competing claims of the right of possession.

Excavation Permits

The substitute amendment establishes a permit process for the excavation or removal of Native American human remains or objects from Federal or tribal lands. The process established under this Act would require any party uncovering human remains or objects on Federal or tribal lands to provide notice to the Secretary of the particular Federal Department with authority over those Federal lands and to the appropriate Indian tribe. After notice has been received the party must cease the activity and make all reasonable efforts to protect the remains or objects before resuming the activity. The activity may resume 30 days after notice has been received. An Indian tribe or Native Hawaiian organization may, after notification, determine the appropriate disposition of any remains or objects found on these lands. Under this notification process, an Indian tribe may determine the appropriate disposition of any remains or objects found on Federal or tribal lands without significant interruption of the activity. The substitute amendment also provides that the Secretary of any department or head of any agency of the United States may delegate his responsibilities under this section to the Secretary of the Interior where the Secretary consents to such delegation.

The Committee intends this section to provide for a process whereby Indian tribes and Native Hawaiian organizations have an opportunity to intervene in development activity on Federal or tribal lands in order to safeguard Native American human remains, funerary objects, sacred objects or objects of cultural patrimony. Under this section, Indian tribes or Native Hawaiian organizations would be afforded 30 days in which to make a determination as to the appropriate disposition for these human remains or objects. The Committee does not intend this section to operate as a bar to the development of Federal or tribal lands on which human remains or objects are found. Nor does the Committee intend this section to significantly interrupt or impair development activities on Federal or tribal lands. Finally, the Committee intends the notice and permit provisions of this section to be fully consistent with the provisions of the Archaeological Resources Protection Act, 16 U.S.C. § 470aa et. seq.

Unlawful Actions

The substitute amendment also amends title 18 of the United States Code to establish criminal penalties for the sale, purchase, use for profit, or transportation for sale or profit of Native American human remains without the right of possession to those remains. It would further amend title 18 of the United States Code to establish criminal penalties for the sale, purchase, use for profit, or transportation for sale or profit of funerary objects, sacred objects or objects of cultural patrimony which were obtained in violation of this Act. A violation of either section could subject the violator to a fine or imprisonment of up to 12 months or both. The criminal pen-

alties for sale, purchase, use for profit, or transportation for sale or profit of funerary objects, sacred objects, or objects of cultural patrimony are prospective in nature so that objects which were obtained prior to enactment are not covered by these provisions.

The criminal penalties for sale, purchase, use for profit, or transportation for sale or profit of the human remains of a Native American shall apply to any Native American human remains, wherever they have been obtained, where the party does not have the right of possession to those human remains as defined in this Act. The Committee intends these provisions to act as a deterrent to unscrupulous dealers who traffic in Native American human remains or objects unlawfully removed prior to the enactment of this Act from Federal lands or tribal lands. The Committee believes that this section in combination with other penalties already enacted into law will help stem the black market trade in unlawfully obtained Native American artifacts and protect Federal or tribal lands from further looting.

Inventory of Native American Collections

The substitute amendment would require Federal agencies and museums receiving Federal funds to conduct an inventory which identifies the cultural affiliation of remains and objects within their collections. The substitute amendment would require these inventories to be completed within five years from the date of enactment. The substitute amendment provides that once a Federal agency or museum makes a determination of cultural affiliation of human remains or objects in its possession, the amendment would require the agency or museum to provide notice to all culturally affiliated Indian tribes or Native Hawaiian organizations. Upon notification, an Indian tribe or Native Hawaiian organization may make a request for the return of such remains or objects.

The substitute amendment provides that once the cultural affiliation of an object is determined and an Indian tribe or Native Hawaiian organization makes a request for its return, then a museum may refuse to return those items for which they have the right of possession as defined in the Act. A Federal agency may refuse to return those objects which are necessary for the completion of a scientific study of major benefit to the United States and to which it has the right of possession. The substitute amendment provides that any agency which fails to comply with the provisions of the Act shall not be eligible to receive Federal funding for the period of the non-compliance. The substitute amendment also provides that a museum that has made a good faith effort to carry out an inventory and identification and has been unable to complete the process within five years may appeal to the Secretary of the Interior for an extension of the time requirements established in the Act.

The Committee believes that the inventory and notice process should allow for the cooperative exchange of information between Indian tribes or Native Hawaiian organizations and museums regarding objects in museum collections. The Committee recognizes that there will be a significant number of Native American human remains, funerary objects, sacred objects and objects of cultural patrimony, where the cultural affiliation can be reasonably ascer-

tained given the totality of the circumstances surrounding the acquisition of the remains or objects. The determination of cultural affiliation shall be based on a preponderance of the evidence. The Committee intends the inventory and notification process established under this section to provide an opportunity for the museum to provide notice to Indian tribes and Native Hawaiian organizations of culturally affiliated remains and objects identified throughout the process. The Committee does not intend the notice requirement in this section to be interpreted to allow Federal agencies and museums to wait until after completion of the entire inventory process before providing notice to Indian tribes or Native Hawaiian organizations.

The Committee also recognizes that there are a significant number of Native American human remains, funerary objects and sacred objects for which the cultural affiliation may not be readily ascertainable. The Committee does not intend this Act to require museums or Federal agencies to conduct exhaustive studies and additional scientific research to conclusively determine the cultural affiliation of human remains or objects within their collections. The Committee recognizes that the inventory process established under this Act could work some hardship on museums which do not possess the resources to inventory their Native American collections. The Committee intends the provisions for an extension of the five year deadline for the inventory process to alleviate any hardship on such museums.

Repatriation

The substitute amendment provides that if the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then upon the request of the Indian tribe or Native Hawaiian organization such remains and objects shall be expeditiously returned. The Committee intends that the repatriation of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony shall be accomplished in consultation with the Indian tribe or Native Hawaiian organization that made the request. The Committee intends that this process allow for Indian tribes or Native Hawaiian organization to present additional evidence to establish the cultural affiliation of objects or remains in museum collections. Although this section requires expeditious return of culturally affiliated objects and remains to the particular Indian tribe or Native Hawaiian organization, the Committee recognizes that Indian tribes and museums may agree to a mutually acceptable alternative to repatriation. The Committee intends that this process will facilitate the negotiation of agreements as to appropriate disposition of objects and remains in museum collections.

The substitute amendment also provides that a museum may refuse to return Native American human remains, funerary objects, sacred objects and objects of cultural patrimony, where the cultural affiliation has been established and the culturally affiliated Indian tribe or Native Hawaiian organization has requested its return, if the museum has the right of possession to such re-

mains or objects. A museum must establish the right of possession by a preponderance of the evidence. If a museum fails to satisfy the burden of proof, then such remains or objects shall be expeditiously returned. The substitute amendment further provides that a Federal agency may refuse to return Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony, where the cultural affiliation has been established and the culturally affiliated Indian tribe or Native Hawaiian organization has requested its return, if the Federal agency establishes that the remains or objects are indispensable for the completion of a specific scientific study the outcome of which would be of major benefit to the United States and that the Federal agency has the right of possession to such remains or objects. Such remains or objects shall be returned no later than 90 days after the completion of the scientific study.

Review Committee

The substitute amendment provides for the establishment of a review committee to monitor and review the implementation of the inventory and identification process. The review committee will be responsible for facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, museums, Federal agencies, and lineal descendants. The Committee intends the Review Committee to serve the very important function of facilitating the resolution of disputes between claimants and disputes between Indian tribes and museums as to the determination of cultural affiliation, right of possession or the character of the items or objects, and disputes as to the appropriate disposition of human remains or objects. The Committee intends the review committee to participate in discussions between Indian tribes and museums in the development of agreements which provide for the disposition of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony. The Committee intends that the findings of the review committee shall not be binding on the parties but that the review committee shall be an advisory committee which makes recommendations to the Secretary and helps facilitate the resolution of disputes regarding the provisions of this Act. The review committee shall submit an annual report to the Congress on the progress made and any problems encountered in implementing the inventory and repatriation provisions of this Act. The substitute amendment provides that the review committee shall review museum requests for extensions of time to complete inventories and make recommendations to the Secretary on such requests.

Grants

The amendment also provides that the Secretary of the Interior is authorized to make grants to Indian tribes or Native Hawaiian organizations to assist such groups in the repatriation of Native American human remains, funerary objects, sacred objects and objects of cultural patrimony. The Secretary of the Interior is also authorized to make grants to museums to assist them in the inventory and identification process established under this Act. The Com-

mittee recognizes that the inventory and identification process may work a hardship on those museums that lack adequate resources to inventory their collections. In order to prevent this hardship, the Committee intends this grant program to provide resources to allow a museum to prepare the inventories required under this Act. The Committee intends that grants to be awarded by the Secretary to Indian tribes or Native Hawaiian organizations would be used for the costs associated with repatriating human remains or objects to Indian tribes. The Committee recognizes that some Indian tribes have expressed interest in curating objects on the reservation once they have been returned. The Secretary may award a grant under this provision to an Indian tribe for the costs of curating certain objects which have been repatriated under this Act.

Savings Provisions/Enforcement

The substitute amendment provides for alternative dispositions of human remains and objects where the Federal agency or museum and the affected Indian tribe or Native Hawaiian organization reach an agreement. In those instances in which the parties cannot reach an agreement regarding the appropriate disposition of Native American human remains, funerary objects, sacred objects and objects of cultural patrimony, the amendment provides that any person may bring an action in Federal court alleging a violation of this Act. The Committee intends this section to provide an avenue after the review committee process for any party; including an Indian tribe, Native Hawaiian organization, museum or agency, to bring a cause of action in the Federal district court alleging a violation of this Act. The Committee intends the Federal District Court to be the forum for a dispute between the parties regarding a determination of cultural affiliation, right of possession, or the character of an article or object in the possession of a museum or Federal agency.

Legislative History

S. 1980 was introduced on November 21, 1989 by Senator Inouye and was referred to the Select Committee on Indian Affairs. The Committee held a hearing on S. 1980 on May 14, 1990. On August 1, 1990, Senator McCain offered an amendment in the nature of a substitute to S. 1980. The bill was considered by the Select Committee in an open business session on August 1, 1990, and was ordered reported as amended.

Committee Recommendation and Tabulation of Vote

In open business session on August 1, 1990, the Select Committee on Indian Affairs, by a unanimous vote of a quorum present, ordered S. 1980, as amended, reported with the recommendation that the Senate adopt the bill.

SECTION-BY-SECTION SUMMARY ANALYSIS

SECTION 1—SHORT TITLE

Section (1) sets out the short title of the bill as the "Native American Grave Protection and Repatriation Act".

SECTION 2—FINDINGS

Section (2) of this bill sets out the findings of the Congress.

SECTION 3—DEFINITIONS

Section (3) of this bill sets out the definitions used in the Act.

SECTION 4—OWNERSHIP

Subsection (a) of this section provides that for any human remains of a Native American or any Native American funerary objects which are excavated or discovered on Federal or tribal land after the enactment of this Act, the lineal descendants of the Native American shall have the ownership, control, or right of possession. It further provides that for human remains and Native American funerary objects where the lineal descendants of the Native American cannot be determined and for sacred objects and objects of Native American cultural patrimony the ownership, control or right of possession shall be in the Indian tribe or the Native Hawaiian organization on whose land the remains or objects are found or in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation.

Subsection (b) provides that the Secretary shall prescribe regulations regarding the disposition of Native American human remains and funerary objects, sacred objects and objects of cultural patrimony not claimed under subsection (a) in consultation with the review committee established under section 5 and Indian tribes and Native Hawaiian organizations.

Subsection (c) provides that nothing in this section shall prevent any Indian tribe or Native Hawaiian organization from expressly relinquishing title to or control over any human remains, funerary objects, sacred objects or objects of cultural patrimony.

SECTION 5—EXCAVATIONS

Subsection (a) establishes a permit process for the excavation or removal of human remains, funerary objects, sacred objects, or objects of cultural patrimony from Federal or tribal lands. It provides that such remains or objects may only be excavated or removed after notice to and upon the consent of the lineal descendants or the appropriate Indian tribe or Native Hawaiian organization. It further provides that a permit issued under this section may only be issued upon proof of notice and consent under this Act.

Subsection (b) provides that any person who knows or has reason to know that he or she has discovered human remains, funerary objects, sacred objects or objects of cultural patrimony on Federal or tribal lands shall notify the Secretary of the agency with primary management authority over those lands as well as the appropriate Indian tribe or Native Hawaiian organization. It further requires any person to cease the activity in the area of discovery and

to make all reasonable efforts to protect said remains and objects before resuming such activity. The activity may resume 30 days after certification that the notice provided for under this section has been received.

Subsection (b) also provides that the responsibilities under this section may be delegated to the Secretary of the Interior by the Secretary of any department or the head of any Federal agency, if the Secretary of the Interior consents.

SECTION 6—UNLAWFUL ACTIONS

Subsection (a) amends Chapter 53 of title 18 of the United States Code to provide a new section 1166. Section 1166(a) provides that whoever knowingly sells, purchases, uses for profit, or transport for sale or profit the human remains of a Native American without the right of possession to those remains shall be subject to a fine or imprisoned not more than 12 months or both. Section 1166(b) provides that whoever knowingly sells, purchases, uses for profit, or transports for sale or profit Native American funerary objects, sacred objects or objects of cultural patrimony obtained in violation of this Act shall be subject to a fine or imprisoned not more than 12 months or both.

SECTION 7—INVENTORY OF NATIVE AMERICAN COLLECTIONS

Subsection (a) requires each Federal agency and museum receiving Federal funds that has possession or control over any human remains or funerary objects of a Native American, or any Native American sacred objects or cultural patrimony to compile an inventory of objects in its possession and control and to identify the geographic and cultural affiliation of the objects to the extent possible.

Subsection (b) sets out the requirements for inventories and identifications required under subsection (a). The inventory and identification shall be conducted in consultation with Indian tribes and must be completed within five years of enactment. The identifications shall be based on the best available historic and scientific documentation. The inventories and identifications shall be completed in consultation with the Indian tribes and Native Hawaiian organizations. The Review Committee established under Section 6 shall have access to the inventories and identifications while they are being conducted and afterward.

Subsection (d) provides that a museum that is unable to complete the inventory and identification process within the five year time period can appeal to the Secretary for an extension of time upon a showing of good faith.

Subsection (e) provides that if the Native American cultural affiliation of an item is established in the identification process by a preponderance of the evidence then the Indian tribe or Native Hawaiian organization shall be notified within 6 months after the completion of the inventory and a copy of the notice shall be sent to the Secretary who shall publish each notice in the Federal Register. Under this section, notice may be provided to the Indian tribe or Native Hawaiian organization prior to the completion of the entire inventory process.

SECTION 8—REPATRIATION

Subsection (a) provides that if the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then upon the request of the tribe or Native Hawaiian organization or the lineal descendants of the Native American, they shall be expeditiously returned. If the cultural affiliation of remains or objects is subsequently established by an Indian tribe or Native Hawaiian organization then upon the request of the Indian tribe or Native Hawaiian organization or lineal descendant such objects shall be expeditiously returned.

Subsection (b) provides that if a lineal descendant, Indian tribe or Native Hawaiian organization requests the return of culturally affiliated remains or objects, the Federal agency or museum shall expeditiously return such remains or objects unless they are indispensable for the completion of a specific scientific study of major benefit to the United States and the museum or agency has the right of possession of said remains or objects.

Subsection (c) provides that once an Indian tribe, Native Hawaiian organization or lineal descendant requests the return of culturally affiliated remains or objects, the museum must prove by a preponderance of the evidence that the museum has the right of possession to such remains or objects. If a museum fails to satisfy the burden of proof, then such remains or objects shall be expeditiously returned.

Subsection (d) provides that the museum shall share information with the known lineal descendant, Indian tribe or Native Hawaiian organization regarding an item in its possession to assist in establishing the cultural affiliation of the remains or objects.

Subsection (e) provides that any museum that fails to comply with the provisions of this section shall not be eligible to receive any Federal funds for the period of non-compliance.

SECTION 9—REVIEW COMMITTEE

Subsection (a) of this section provides that the Secretary shall establish a review committee within 120 days after enactment of this Act to monitor and review the implementation of the inventory and identification process.

This section provides a description of the composition of the committee and the duties and responsibilities of the committee. It provides that the review committee shall review requests for extensions for the completion of the inventory process, facilitate the resolution of any dispute among Indian tribes, Native Hawaiian organizations, Federal agencies, museums or lineal descendants relating to the return of remains or objects, and compile an inventory of unidentifiable human remains that are in the possession or control of Federal agencies or museums.

This section provides that the review committee shall issue a preliminary report on the inventory no later than 3 years after the date the committee was established. The committee shall make a final report and recommendations to the Congress and the President no later than 6 years after the date the committee was established. The committee shall terminate 120 days after the Secretary

certifies in a report to the Congress that the work of the committee is completed.

SECTION 10—GRANTS

This section provides that the Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations to assist such groups in the repatriation of remains and objects and to make grants to museums to assist museums in the inventory and identification process under this Act.

SECTION 11—SAVINGS PROVISIONS

This section provides that nothing in this Act shall be construed to limit the authority of any Federal agency or museum to return or repatriate any remains or objects to Indian tribes, Native Hawaiian organizations or lineal descendants or to enter into agreements for the dispostion of control over objects covered by this Act. It further provides that nothing in this Act shall be construed to limit any substantive or procedural right secured to a Native American or an Indian tribe or Native Hawaiian organization or limit the application of any State or Federal law pertaining to theft or stolen property.

SECTION 12—REGULATIONS

This section authorizes the Secretary of the Interior to promulgate regulations to carry out this Act.

SECTION 13—AUTHORIZATION OF APPROPRIATIONS

This section authorizes the appropriation of such sums as are necessary to carry out the provisions of this Act.

SECTION 14—ENFORCEMENT

This section provides that the United States District Court shall have jurisdiction over any action brought alleging a violation of this Act and may issue such orders as are necessary to enforce the provisions of this Act.

COST AND BUDGETARY CONSIDERATION

The cost estimate for S. 1980 as provided by the Congressional Budget Office, is set forth below.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 21, 1990.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1980, the Native American Grave Protection and Repatriation Act, as ordered reported by the Select Committee on Indian Affairs, August 1, 1990. CBO estimates that enactment of this legislation would cost the federal government between $20 million and $55 million over five years, assuming appropriation of the neces-

sary funds. The range of total estimated costs is wide primarily because of uncertainty about the cost of compiling an accurate inventory of Native American human remains.

S. 1980 would regulate ownership, trade and disposition of Native American remains, burial objects, and objects of sacred or cultural significance. Human remains or funerary objects found on federal land would be returned to the most closely affiliated tribes, permits would be required for excavation of remains found on federal or tribal lands, and it would be illegal to trade in Native American remains or funerary objects.

S. 1980 also would require that federal agencies and museums that receive federal funding create inventories of Native remains and objects covered by the bill, notify tribes of their holdings and return objects to tribes upon request. The bill would require that inventories be completed within five years of enactment. A review committee would be established to oversee the process of repatriation, mediate disputes and review museums' progress in completing inventories. The bill would authorize the appropriation of such sums as are necessary for grants to assist museums in compiling inventories and to assist tribes in pursuing their claims. Although no funds are specifically authorized for federal agencies that have collection of remains and other objects, the estimated costs to these agencies (primarily the Department of the Interior and the Department of the Army) are included in this estimate. The bill exempts the Smithsonian, which is covered by the National Museum of the American Indian Act.

The main costs from enactment of S. 1980 would be the cost to federal agencies of preparing the inventories required by the bill and the cost of grants to museums to assist them in carrying out inventories. To some extent, the total cost is discretionary—the more funds made available, the more accurate and comprehensive will be the information collected by museums. This estimate represents the cost of compiling an initial inventory based on existing information. Two variables determine the cost: the number of remains and associated objects and the cost to inventory each object. This estimate assumes that museums and federal agencies hold between 100,000 and 200,000 Native American remains and 10 million to 15 million other objects that would have to be reviewed.

The cost of preparing an accurate inventory of the origin and tribal affiliation of human remains can vary considerably depending on the information already available, the amount of research needed to accurately determine tribal affiliation and the contentiousness surrounding individual pieces. There is considerable disagreement about the nature of the inventory required by S. 1980, and widely varied estimates of costs. Based on the experience of museums that have already repatriated remains, we assume costs of $50 to $150 per remain, or a total cost of between about $5 million and $30 million over five years. This estimate includes the costs of an inventory of museums' collections, as well as a review of existing studies and research to determine origin. More extensive studies costing up to $500–$600 per remain may be necessary to determine the origin of some of the remains; however, such studies generally are not required by S. 1980.

Other objects covered by S. 1980 are less costly to inventory and identify. CBO estimates cost of about $10 million to $15 million over five years for museums to prepare inventories of their archaeological collections based on existing information and to identify objects which may be of interest to tribes. Finally, S. 1980 would provide grants to tribes to assist them in the repatriation of the remains and objects covered in the bill. This effort could include assistance in pursuing tribal claims as well as assistance in repatriating the remains. CBO estimates costs of $5 million to $10 million over five years for these grants.

As operators of about one-third of all museums, state and local governments could face costs from enactment of S. 1980. Assuming appropriation of adequate amounts by the federal government, however, these costs would be covered by federal grants made available under the bill.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Marta Morgan, who can be reached at 226-2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 1980 will have minimal regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The only communications received by the Committee from the Executive Branch regarding S. 1980 were in the form of testimony from the Department of the Interior and a letter from the Department of Justice. Set forth below is the testimony of Mr. Jerry L. Rogers, Associate Director, Cultural Resources, National Park Service, Department of the Interior at the May 14, 1990 hearing of the Select Committee on Indian Affairs and a letter from Mr. Bruce C. Navarro, Deputy Assistant Attorney General, Department of Justice dated August 1, 1990.

STATEMENT OF JERRY L. ROGERS, ASSOCIATE DIRECTOR, CULTURAL RESOURCES, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE SELECT COMMITTEE ON INDIAN AFFAIRS, ON S. 1021 AND S. 1980, MAY 14, 1990

Mr. Chairman, I appreciate the opportunity to appear before the committee to discuss S. 1021 and S. 1980's, treatment of human remains, funerary objects, sacred objects, and objects of Native American patrimony from archeological sites.

The Administration has not had an opportunity to thoroughly review the draft substitute for S. 1980 recently developed by committee staff. Thus, the Administration cannot take a position on the legislation until an interagency review is completed. A report

outlining the Administration's views will be available early this summer. I would note that in March, Secretary Lujan directed the National Park Service to develop a new policy and revise an existing guideline on the treatment of human remains and funerary objects. The Park Service has been working informally at the staff level for over a year on a review of the current policy and guideline. This informal review has included meetings with representatives of Indian groups, as well as with archeological and museum groups.

Secretary Lujan wants a more sensitive treatment of archeological human remains, funerary objects, sacred objects, and objects of Native American cultural patrimony by managers of Interior lands. He wants other Federal, State and local agencies that look to the Secretary of the Interior for guidance to adopt similar sensitive approaches. The specifics of the Interior policy and guidelines remain to be defined following more detailed consultation with Indian, archeological, museum, and other interested groups. However, the Secretary has indicated that he wants to affirm the rights of Tribes to determine the treatment that is afforded human remains and associated objects that are affiliated clearly with the Tribe.

This concludes my prepared remarks, Mr. Chairman. I would be pleased to answer any questions you may have.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, August 1, 1990.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter presents the views of the Department of Justice on an amendment proposed by Senator McCain in the nature of a substitute to S. 1980, the "Native American Grave Protection and Repatriation Act." The McCain bill would protect and provide for repatriation of Native American human remains, objects associated with those remains, and other objects of Native American culture.

On the policy goals and efficacy of this bill, we defer to the federal agencies responsible for administration of Native American programs, particularly the Department of the Interior. As to the legal issues involved, however, we believe that S. 1980—in its current form—may raise constitutional concerns.

1. *Repatriation.*—Section 4(c)(3)(A) of S. 1980 would require the Secretary of the Interior to "prescribe regulations . . . that provide for the repatriation to the appropriate Native American group" of protected objects "which *may have been excavated* under the authority of any Federal law or under any permit issued by a federal agency." (Emphasis added.) As currently drafted, the language of this section is unclear on whether repatriation would be required of protected objects excavated in the past pursuant to federal permits. The use of the passive voice—"may have been excavated"—might be interpreted to suggest such retrospective application.

If that is the intent of Congress, then section 4(c)(3)(A) would implicate the Takings Clause of the Fifth Amendment, which pro-

vides that "private property" shall not be taken for "public use" without the payment of "just compensation" to the owner. Depending upon the circumstances, protected objects excavated by a private party pursuant to a federal permit might constitute "private property" within the meaning of the Takings Clause. The Antiquities Act of 1906, for example, provides that a permit shall be required for "excavation of archaeological sites" on federal lands. 16 U.S.C. § 432. As a condition for receipt of such a permit, the applicant must provide for "permanent preservation [of excavated objects] in public museums." Id. A private party who has acted in accordance with a permit under the Antiquities Act would have a strong argument that excavated items displayed in compliance with the conditions set by the permit constitute the "private property" of that party.

This problem could be resolved by an amendment to section 4(c)(3)(A) to clarify that the repatriation regulations required by S. 1980 shall apply only prospectively. Alternatively, section 4(c)(3)(A) might specifically provide that any protected object in which a private party has "legal title" would not be subject to repatriation. Such an amendment would bring section 4(c)(3)(A) into line with section 5(c)(1) of the bill, which would permit private museums to resist repatriation upon a showing of "legal title" to the requested object. Under either suggested amendment, "private property" would not be taken within the meaning of the Takings Clause.

Absent such revisions, further issues would arise under the "public use" and "just compensation" requirements of the Takings Clause. The courts generally will defer to Congress' determination of what constitutes a "public use" of private property. See *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 240 (1984). The Government "does not itself have to use property to legitimate the taking," *id.* at 244; transfers of property from one private party to another have been upheld when designed by the legislature to further a public purpose, see e.g., *id.* Here, however, Congress has inserted no findings in S. 1980 to explain how the transfer of protected objects from private parties to Native American groups will advance the public good. Should Congress wish to reach private property through S. 1980, it would be advisable that such findings be included.

Finally, the Takings Clause requires that "just compensation" be paid for the taking of private property. The absence of a compensation procedure in S. 1980 would not prevent a private party from obtaining payment in the event that a taking is effected. Under the Tucker Act, a private party may seek compensation in the Claims Court. 28 U.S.C. § 1491(a) (jurisdiction to resolve claims against the United States based upon the Constitution). Such compensation payments might significantly increase the cost of repatriation legislation.

2. *Appointment of Review Committee.*—Under section 6(a)(2) of S. 1980, the Secretary of the Interior would be required to establish a "review committee" that "shall be composed of 7 members, 4 of whom shall be appointed from nominations submitted by Native American groups." The committee shall, inter alia, "review[] upon the request of any affected party, any finding relating to" the iden-

tification of a protected object or the return of such an object. § 6(a)(3)(B).

As drafted, the bill would not accord binding legal force to the committee's review. Indeed, section 6(b)(5) states that the committee shall not have authority to transfer "legal title" to any protected object. Should Congress intend otherwise, section 6(a)(2) of the bill would need to be amended to conform the procedures for appointment of the review committee to the Constitution's Appointments Clause. See U.S. Const., Art. II, § 2, cl. 2; *Buckley* v. *Valeo*, 424 U.S. 1, 126, 141 (1976) (officials exercising "significant authority pursuant to the laws of the United States" must be appointed pursuant to the Appointments Clause). While the Appointments Clause permits Congress to vest the appointment of "inferior Officers" in the President alone, we do not believe that it sanctions limitations upon the power of appointment by reference to a fixed list of nominess, because such a requirement would permit the creator of the list—here, Native American organizations—to share in the appointment power.

3. *Access Requirement.*—Section 6(a)(5) of H.R. 5237 also concerns the review committee. This section would require the Secretary of the Interior to "ensure" that the committee will have "full and free access" to any protected objects necessary for their review. In its current form, the language of section 6(a)(5) might implicate the Takings Clause in particular situations. A court will ask whether the particular intrusion "unreasonably impair[s]" the economic value of private property. *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980). In this "ad hoc inquiry," the court will regard several factors as "particularly significant—the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982).

Here, a requirement of "full and free" access might be read broadly to authorize the sequestration of protected objects that would otherwise be part of a major exhibition in a private museum. Although the result would turn largely upon the particular facts, a private museum would have a substantial argument that such an intrusion constitutes a taking and, thus, must be accompanied by the payment of just compensation. To avoid such a situation, we recommend amendment of section 6(a)(5) to provide merely for "reasonable access" to protected items by the review committee.

The Office of Management and Budget has advised the Department that it has no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

BRUCE C. NAVARRO,
Deputy Assistant Attorney General.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that enactment of S. 1980 will result in the following changes in existing law:

Chapter 53 of Title 18 of the United States Code is amended by adding at the end thereof section 1166 (a) which provides that whoever knowingly sells, purchases, uses for profit, or transports for sale or profit the human remains of a Native American without the right of possession to those remains shall be subject to a fine or imprisoned not more than 12 months or both, and section 1166 (b) which provides that whoever knowingly sells, purchases, uses for profit, or transports for sale or profit Native American funerary objects, sacred objects or objects of cultural patrimony obtained in violation of this Act shall be subject to a fine or imprisoned not more than 12 months or both.

○